Chapter VII

FIELD INVESTIGATIONS: DISTRICT OFFICES

A. General Description of Functions

Complaints and reports about California physicians which have passed through the screening process of the Central Complaint Unit (see generally Chapter VI) are referred to MBC's district offices for investigation. This chapter describes the investigative process of the district offices and the Monitor's initial concerns about that process, and presents the Monitor's initial recommendations for its improvement.

District offices' role in current process. As illustrated in the organizational chart in Exhibit V-A above, MBC maintains twelve field offices (called "district offices") staffed by professional peace officer investigators and supervising investigators. A complaint that warrants additional scrutiny after CCU screening is referred "to the field" in the geographical area where the subject physician practices. The case is assigned to one of MBC's investigators, who reviews the existing file, develops an investigative plan for the particular matter, and conducts the investigation. In this work the investigator is assisted, in appropriate circumstances, by a district office "medical consultant" (a licensed physician retained to assist in such matters), the district office's supervising investigator, and in some instances a deputy attorney general from the Health Quality Enforcement (HQE) Section of the Attorney General's Office.

The subsequent investigation typically includes the gathering of additional medical records or other documentary evidence; locating and interviewing the complainant(s) and other witnesses; interviewing the subject physician; and — in quality of care cases — securing review of the entire investigative report and the evidence by an "expert reviewer" (again, a licensed physician in the same or similar specialty as the complained-of physician) who opines on the standards of care applicable to the particular matter, whether the subject physician's conduct fell below those standards, in what way(s), and to what degree. Particular cases may also involve other less frequent tasks, including drafting and serving investigational subpoenas, inspecting the location where events at issue occurred; conducting undercover operations; or drafting and serving search warrants. A complete investigation report is prepared by the investigator and, as appropriate, the expert reviewer provides required expert analysis of the alleged violation.

If the investigation indicates no violation of the Medical Practice Act or the matter is determined to be "non-jurisdictional" (outside the scope of MBC authority), the complaint is closed under the characterization "closed–no violation."[145] If insufficient evidence is found to file formal charges (for example, evidence is found of simple negligence only as opposed to an extreme departure from the relevant standard of care, or MBC is unable to obtain expert opinion to support an actionable violation), the case is characterized as "closed–insufficient evidence." Where the investigation reveals sufficient evidence to allege violations of the Medical Practice Act, the matter is reviewed by the appropriate supervising investigator and deputy attorney general and then transmitted to HQE for administrative action, or — where appropriate — to local prosecutors for the filing of criminal charges. (Technically, at this point the investigation is closed and a "disciplinary case" is opened for recordkeeping purposes.)

When a case is transmitted to HQE for administrative accusation, the assigned investigator retains the case as a "pending legal action," and may be asked to perform supplemental investigative tasks. The amount of such post-transmittal assistance varies widely, and in many cases consists of little further contact between investigator and trial prosecutor. Personnel guidelines for MBC investigators encourage the closing or transmittal of 2–3 investigations per month, and the overwhelming majority of investigator time is spent on current investigations in the district offices. In some instances, HQE attorneys have found substantial resistance to their requests for follow-up tasks on the part of MBC investigators; other instances find a better level of supplemental investigative assistance.

As reflected in Exhibit V-C above, Medical Board investigators opened 1,887 investigations, closed 2,117 investigations, referred 580 matters to HQE for administrative enforcement action, and referred 37 cases for criminal action in 2003–04.

District offices' structure and resources. The MBC enforcement program's organizational chart (Exhibit V-A above) shows the structure and staffing of the MBC district offices. A Deputy Chief of Enforcement oversees the Office of Investigative Services, and is responsible for twelve district offices, which are administratively divided into a "Northern Area" (Sacramento, Pleasant Hill, San Jose, and Fresno), a "Southern Area" (Rancho Cucamonga, San Bernardino, Tustin, and San Diego), and the "Los Angeles Metropolitan Area" (Valencia, Glendale, Cerritos, and Diamond Bar). Each administrative area is supervised by a Supervising Investigator II.

A typical district office is supervised by a Supervising Investigator I, and is comprised of four or five Senior Investigators, two medical consultants (serving on a part-time basis, as described below), and two or three support staff including investigative assistants and office technicians.

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[145] For details on MBC terminology and criteria relating to investigations, *see* Medical Board of California, *Enforcement Operations Manual*, Ch.7, at §7.1; *see also* Bus. & Prof. Code § 800(b).

The district offices' total current investigator staffing includes three Supervising Investigator IIs, thirteen Supervising Investigator Is, 70 Senior Investigators, and nine Investigative Assistants. This staffing level represents a troubling loss of 29 enforcement program positions — including 19 sworn (peace officer) investigator positions — in the past three years.[146] These resource reductions have cut the normal district office complement of Senior Investigators from six to five, and have required the curtailment of several important district office initiatives, including: (1) Operation Safe Medicine, a specialized unit in southern California addressing the growing problem of unlicensed practice of medicine; (2) a small unit conducting Internet prescribing investigations; and (3) an investigator position dedicated to providing post-accusation assistance to HQE prosecutors.

As of October 1, 2004, the district offices reported 1,060 active investigations, with an additional 494 cases maintained on the records as "AG Assigned Cases" (where possible follow-up tasks might be required). The present average investigator caseload is 18 active investigations and eight "AG Assigned Cases."[147]

Role of the Attorney General in the investigative process. Prior to 1997, district office investigators worked with little input from the attorneys of the Attorney General's Office, notwithstanding that those attorneys would ultimately prosecute MBC's cases. In 1990, SB 2375 (Presley) added Government Code section 12529 *et seq*. to require the Attorney General's Office "to assign attorneys to assist [DMQ] in intake and investigations to direct discipline-related prosecutions."[148] This provision specifically directs that "[a]ttorneys shall be assigned to work closely with each major . . . investigatory unit" to assist in the handling of complaints "from receipt through disposition."[149] However, it was not until January 1, 1997, that this statutory requirement was formally implemented, with the introduction of the "Deputy in District Office" or "DIDO" program.

In the DIDO program, deputies attorney general (DAGs) from HQE work in MBC district offices one or more days a week in order to provide legal assistance and guidance to investigators. In concept, DIDO DAGs advise investigators on legal issues; assist in subpoena enforcement to help investigators obtain requested medical records; review completed investigations before their referral to HQE (to ensure that all "loose ends" are tied up and the matter is ready for pleading); and, in some offices, draft initial pleadings in investigations being transmitted from district offices to HQE for accusation filing. In practice, the nature and degree of assistance provided by DIDO DAGs varies

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[146] Medical Board of California, *2003–04 Annual Report*, at iv.

[147] *Id*. at vi.

[148] SB 2375 (Presley), Cal.Stats. 1990, c. 1597.

[149] *Id.*

considerably among the various district offices and the differing DIDO attorneys. Some DIDOs have developed a close working relationship with district office investigators and provide active support of all types described above; other DIDOs have a less immediate rapport with district office staff, and provide less active support.

Role of medical consultants in the investigative process. Each MBC district office is also staffed with one or two medical consultants, who are licensed physicians working on a part-time basis under the direction of the Supervising Investigator to provide medical advice and information in support of MBC investigations. The role of the medical consultants includes: providing medical expertise to assist MBC investigators in evaluating the professional competence and conduct of doctors; interpreting the medical significance of information and evidence; arranging for and coordinating the expert review of medical records; inspection of medical records to assure conformance with the law; and assisting with physician and witness interviews and counseling, as appropriate.[150]

MBC medical consultants must possess a valid license to practice medicine in California, a valid medical or osteopathic specialty certificate, and at least five years of experience within the last seven years in the practice of medicine and surgery or in one of the specialties.[151] In current practice, the typical medical consultant is a recently retired or part-time practitioner who works 10–15 hours per week at a district office assisting in the investigative and expert review process. While all current MBC medical consultants retain their active license to practice, and some continue to practice on a part-time basis, a number of them have been entirely out of the active practice of medicine for more than two years (raising an issue regarding compliance with the job description requirement of five years experience within the last seven years).

The medical consultant participates in the typical case path by: (1) reviewing the initial file and records to assist in the decision whether to interview the subject doctor; (2) assisting in the obtaining of necessary records, including drafting declarations in support of subpoenas for records, where necessary; (3) helping the assigned investigator conduct the subject interview and in deciding whether the case should be closed or sent to an expert reviewer; (4) locating the expert reviewer and arranging for the reviewer to have the appropriate case materials; and (5) assisting in the review of the expert opinion and contributing to the decision on transmitting the case.

Statutory goals for MBC investigative process. In 1990, following extensive criticism of lengthy delays in MBC investigations, SB 2375 (Presley) added Business and Professions Code

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[150] California State Personnel Board specification for "Medical Consultant (Enforcement)," published in Medical Board of California, *Medical Consultant Information Booklet* (1999), at 1.

[151] *Id*.

section 2319, which establishes the goal that "an average of no more than six months will elapse from the receipt of the complaint to the completion of the investigation." Cases involving "complex medical or fraud issues or complex business or financial arrangements" should be investigated within one year.[152] As indicated in Exhibit VII-A below, in fiscal year 2003–04, the average timeframe for the completion of only the investigative portion of MBC case processing was 261 days.

Ex. VII-A. FY 2003–04 Investigation Timeframes By Disposition and Day Range

Day Range	Non-Legal Closure		Referred for Legal Action[1]		Total	
	Number	Percent	Number	Percent	Number	Percent
1 Month or Less	83	7.0%	144	23.8%	227	12.7%
1 to 3 Months	133	11.2%	36	6.0%	169	9.4%
3 to 6 Months	239	20.2%	80	13.2%	319	17.8%
6 to 9 Months	248	20.9%	69	11.4%	317	17.7%
9 to 12 Months	195	16.5%	80	13.2%	275	15.4%
12 to 18 Months	206	17.4%	110	18.2%	316	17.7%
18 to 24 Months	67	5.7%	67	11.1%	134	7.5%
More than 24 Months	14	1.2%	19	3.1%	33	1.8%
Total, Excluding Change of Address Citations	**1,185**	**100.0%**	**605**	**100.0%**	**1,790**	**100.0%**
Average Timeframe, Excluding Change of Address Citations	**256 Days**		**269 Days**		**261 Days**	
Change of Address Citations (2-Day Avg. Processing Timeframe)	327	21.6%	0	0.0%	327	15.4%
Total, Including Change of Address Citations	**1,512**	**100.0%**	**605**	**100.0%**	**2,117**	**100.0%**
Average Timeframe, Including Change of Address Citations	**201 Days**		**269 Days**		**220 Days**	

[1] Includes both AGO and DA referrals. Dual referred cases are counted once.

Source: Medical Board of California

B. Initial Concerns of the MBC Enforcement Monitor

1. MBC investigations are plagued by delays and excessive case cycle times.

The Medical Board's enforcement program is plagued by excessive case cycle times and persistent and troubling delays in the investigative process. The Medical Board has consistently failed to comply with the statutory goals set by the Legislature for the investigative process. As described above, section 2319 establishes as the goal for the MBC discipline system that "an average of no more than six months will elapse from the receipt of the complaint to the completion of the investigation."[153] These provisions were added by the Legislature in 1990 with the goal of MBC meeting these standards by *January 1, 1992.* At no time since that target date has the Board come close to meeting these efficiency goals.

As illustrated in Exhibit VII-A above, the average elapsed time for an MBC investigation is now 261 days (when one-day closures of "change of address citations" are factored out), up from a

[152] Bus. & Prof. Code § 2319(a) and (b).

[153] *Id*.

similarly-calculated 243 days in 2002–03. This elapsed investigative time must be added to the typical CCU complaint processing time, presently averaging 79 days (see Exhibit VI-H above). The resulting accumulated average of 340 days to completion of investigation means that MBC complaints take roughly twice as long on average as the state's statutory goal of 180 days for these cases. And many MBC cases take far longer than that to reach investigative completion. As of 2003–04, roughly two-thirds of all investigations take longer than the six-month goal, and fully 27% take an average of 15 months, or 2.5 times as long as the state says these case should require.

These case cycle times have been a concern for many years, and MBC made substantial progress in reducing investigative timeframes during the 1990s. The current average elapsed investigative time of 261 days compares favorably to the 1991 average of 315 days, reflecting noteworthy improvements in staff and process during much of the past decade.[154] However, some of this progress has now eroded, and in any event such improvement is relative, when investigation (which is just one component of the multi-phase MBC process) still takes an average of nine months, and successful disciplinary cases take an average of 2.63 years to complete.[155] Substantial public dissatisfaction with the MBC process — including rates of dissatisfaction "with the overall service provided by MBC" of between 60% and 79% in the most recent years in which such surveys were conducted — must be attributed in large part to this agonizingly slow process.[156]

To be sure, there are multiple personnel and business process factors which contribute to these delays and long cycle times, and many of these are beyond the control of district office staff. Our interviews and research revealed a number of contributing causes of lengthy case timeframes:

■ **Complexity and difficulty of MBC cases.** Any balanced assessment of the lengthy MBC investigation must begin with an acknowledgment of the inherent complexity of many Medical Board investigations, which often involve highly technical medical issues, complicated facts, and multiple victims and witnesses. These complexities are compounded by the challenge of the applicable burden of proof, which requires "clear and convincing proof to a reasonable certainty"[157] — as opposed to the preponderance standard applicable at physician discipline cases in many other states — to establish violations.

■ **Reductions in district office staff**. As discussed above, MBC was making progress reducing the historically long cycle times, but the more recent erosion of that progress is at least

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[154] *See* Medical Board of California, *2002 Sunset Review Report* (May 2002) at 80.

[155] *See supra* Ex.V-D (2003–04 average total elapsed time of 960 days, or 2.63 years).

[156] *See* Medical Board of California, *2002 Sunset Review Report* (May 2002) at 65 (dissatisfaction rates ranging from 79% in 1997 to 60% in 2000, the last year such surveys were conducted).

[157] *See Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal. App. 3d 853.

partly due to the loss of 19 line investigator positions in the past three years. This 25% loss of investigative staff, coupled with equivalent losses in support staff, have placed a proportionally larger burden on remaining staff and have often meant significant losses of valuable experienced field operatives.

■ **Losses of other valuable resources.** Continuing delays are also partly attributable to other resource reductions. During fiscal year 2003–04, the district offices were forced to absorb a 15% reduction in total medical consultant hours, meaning unavailability or delay in obtaining the medical consultations needed to move cases forward. A similar, but less easily measured, resource strain has resulted when expert reviewers in key specialty areas, already in short supply, have been tapped by the newly-implemented specialty reviewer process at MBC's Central Complaint Unit, resulting in delays in finding and engaging the essential expert reviewers.[158]

■ **Recruitment and retention challenges.** In addition to the problems arising from reduced staff size, MBC faces a substantial institutional challenge in recruiting and retaining highly qualified peace officer investigators. Especially when contrasted with competing hiring agencies such as the California Department of Justice, MBC peace officer pay and benefits are not high enough to avoid loss of staff to those other agencies.[159] This problem has cost MBC some of its better and more experienced investigators and impedes replacement hiring, especially in high-cost regions such as the Bay Area.

■ **Changed case mix.** Improvements in CCU's complaint handling and screening have resulted in fewer easily-closed "technical" violations being sent to the district offices, increasing the number of complex cases under investigation in the field. This factor will necessarily tend to increase average case cycle time if the proportion of complex or difficult cases is greater.

■ **Defense counsel use.** There is evidence of a substantial trend toward doctors retaining and using defense counsel earlier and more frequently in the investigation process. Although a physician's right to retain counsel is unquestioned, the practical effect is often greater procedural delay as counsel interpose objections, complicate the records procurement process, and insist on scheduling and process accommodations.

In general, MBC's remaining cadre of investigators are competent and dedicated, and they are doing a good job of maintaining the volume and quality of casework despite these challenges. MBC's district offices are closing or referring for legal action more cases than they are receiving.

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[158] *See supra* Ch. VI.B.3.

[159] Source: Medical Board of California staff (Apr. 20, 2004).

In 2003–04, district offices investigators closed 2,117 cases and received only 1,887, a pattern of closings exceeding openings which has been attained in three of the past four years.[160] Partly as a result, investigations pending at the close of the fiscal year have declined from 1,531 to 1,060 in the past two years.[161]

However, despite MBC investigator caseloads at near record lows (presently 18 cases per investigator, exclusive of "AG Assigned cases")[162] — dramatically lower than investigator caseloads at other agencies such as the Contractors State License Board and the State Bar of California[163] — there is still a persistent pattern of noncompliance with section 2319's six-month case processing goal. And although MBC's investigators are working hard to maintain work volume in a time of reduced resources, case cycle times are again trending upward.

Despite the good efforts of MBC investigators, MBC investigations still take too long and suffer many avoidable delays. Some of the contributing factors listed above are not immediately susceptible of change. But these delays also result in no small part from a pervasive "hurry up and wait" phenomenon — largely beyond the control of district office investigators in the current system — the causes of which may indicate ways for dramatic improvement in case cycle times.

These troubling sources of delay persist in part because MBC field investigators must continually wait at many stages of their process. They must:

(1) Wait to get complete medical records, or to obtain certified copies of those records. The average timeframe for receipt of requested medical records at MBC field offices is *74 days* (five times longer than the 15-day statutory period in section 2225).[164]

(2) Wait for the medical consultant to review the medical records and the investigation report in QC cases and recommend whether the subject physician should come in for an interview. With the reduction in medical consultant work hours, many investigators tell us this process can require weeks or months of additional delay.

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[160] *See supra* Ex. V-C.

[161] *Id.*

[162] *Id.*

[163] *See, e.g.,* Papageorge and Fellmeth, *Final Report of the CSLB Enforcement Monitor* (April 1, 2003) at 46, Ex. III-G (average CSLB investigator caseload was 39.03 cases as of December 31, 2002). As of October 1, 2004, State Bar investigators in Los Angeles carried an average of 34 open cases each; their counterparts in the Bar's San Francisco office carried an average of 37 cases each. Interview with Russell Weiner, Deputy Chief Trial Counsel, State Bar of California (Oct. 18, 2004).

[164] Source: Medical Board of California staff (Sept. 10, 2004).

(3) Wait for the subject to agree to be interviewed and to appear for the interview. The current average time between initial request and actual subject interview is 60 days.[165]

(4) Wait for the medical consultant to draft a memo on the subject interview and recommend whether case should go forward to expert review, a process that again is subject to delays attributable to limited availability of medical consultant work hours, and also subject to the differing report writing skills and diligence of different consultants.

(5) Wait while the medical consultant locates an appropriate expert reviewer, and then wait to receive that expert reviewer's opinion. This delay is often attributable to the continuing shortage of qualified and willing experts, especially in particular problem specialties such as neurology, obstetrics/gynecology, and neonatology, and is also a function of the investigators' limited control over these high-demand specialists. The current average wait to receive the expert reviewer's report is 69 days, or more than twice as long as the MBC's own performance goal of 30 days.[166]

Successfully addressing the causes of these lengthy built-in delays will significantly reduce the stubbornly long case cycle times in MBC investigations.

2. Attorney/investigator coordination and teamwork is inadequate.

The performance of the MBC's investigative staff and HQE's prosecutors, and the nature of the working relationship between the HQE and MBC, have been studied closely in this project. MBC investigators and HQE prosecutors are hard-working and skilled professionals, and much good disciplinary work is done every day by these dedicated public servants. All parties acknowledge good faith and good efforts on all sides. However, there is clearly room for improvement in the cost, speed, and effectiveness of the administrative enforcement system as presently constituted, as indicated by the lengthy case cycle times and comparatively modest case outputs noted by the state Legislature and other critiques.[167]

Notwithstanding good faith efforts, the current system linking MBC investigators and HQE prosecutors is characterized by inadequate coordination and teamwork. MBC investigators generally function without true, close coordination with the trial prosecutor who will ultimately handle the case. MBC investigators seldom work directly with or receive guidance from the attorney who actually

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[165] Source: Medical Board of California staff (Sept. 10, 2004).

[166] *Id.*; *see infra* Ch. VIII.B.1.

[167] *See generally* Center for Public Interest Law, *Physician Discipline in California: A Code Blue Emergency* (Apr. 5, 1989); Joint Legislative Sunset Review Committee, *Review and Evaluation of the Medical Board of California* (Apr. 1998); Joint Legislative Sunset Review Committee, *Medical Board of California, 2002 Sunset Review* (May 2002).

prosecutes their cases. Despite the good intentions of the DIDO program, most MBC investigators still receive only limited legal support for their investigative work; they rarely work directly with assigned trial counsel during the critical formative phases of the case; and they seldom play a significant role in the pre-hearing and hearing process to which their work is directed.

This system of limited investigator/trial attorney joint work and cooperation is typical of the "hand-off prosecution model" best suited to more simple street crime prosecutions. MBC's hand-off model stands in sharp contrast to the "vertical prosecution model" widely used in complex white collar crime and regulatory matters.

Current MBC/HQE "hand-off prosecution" process. Rather than early and continuing attorney/investigator teamwork that typifies the handling of complex cases in most prosecutors' offices, the enforcement process at MBC involves (1) an investigator with limited legal guidance and support investigating a case, preparing the file, and "handing off" or transmitting the case to (2) an HQE attorney who has had no role in the shaping or preparation of the case and must function with little or no investigative support in the pre-hearing and hearing process. Although the "hand-off" system may work adequately in simple street crime cases, it is woefully inadequate for complex white collar crime-type cases of the sort usually handled by MBC— where the subject is highly technical, the facts and legal issues are complicated, and the process requires a lengthy commitment of time and enthusiasm to achieve a sound result.

This MBC "hand-off" investigation/prosecution process has long been criticized as inadequate and inefficient. The 1989 *Code Blue* report characterized this "fragmented and unsupervised" system as poorly structured to handle medical cases which "are often complex and involve difficult questions of proof."[168] These criticisms were central to the purposes of SB 2375 (Presley), which originally proposed a true vertical prosecution approach, then enacted a compromise creating a specialized Health Quality Enforcement Section in the Attorney General's Office which would "assign attorneys to assist [DMQ] in . . . investigations and to direct discipline-related prosecutions."[169] And thirteen years after *Code Blue*, the Board's own *2001 Sunset Review Report* spoke of the important goal of assigning prosecutors early in cases to "reduce the length of time needed by deputies to prepare accusations and for prosecution, and produce a higher quality product."[170]

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[168] Center for Public Interest Law, *Physician Discipline in California: A Code Blue Emergency* (Apr. 5, 1989) at 68.

[169] *See supra* Ch. IV.B. and IV.C. for details on the purposes of SB 1434 (Presley) and SB 2375 (Presley), and the ultimate compromise resolution on this issue.

[170] *See* Medical Board of California, *Sunset Review Report* (Sept. 1, 2001) at 79.

As described above, in 1997 a formal effort was finally undertaken to address this shortcoming with the "Deputy in District Office" (DIDO) program. DIDO, itself a product of the compromise in SB 2375 in 1990, has provided limited legal advice and assistance for district office investigators. To the extent the DIDO program has brought some of the benefits of a true vertical prosecution model, it represented an improvement. But from its inception, the DIDO program was a halfway measure intended to offer some of attributes of vertical prosecution without significant systemic change. According to numerous investigators and HQE attorneys we interviewed, the DIDO program has produced inconsistent and partial results, ranging from useful assistance to little benefit, depending largely on geographical area and the personalities of the staff involved. None of the involved personnel view the DIDO program as accomplishing a true integration of investigators and prosecutors into a closely-knit and effective team.

Even under the DIDO program, the current investigator/attorney relationship has serious limitations and weaknesses:

■ **Inadequate communication and coordination**. With few exceptions, the present system (even with DIDOs in place) permits only inadequate communication and consultation between the primary field investigator — who is now responsible for key strategic decisions, crucial witness interviews, and expert contacts — and the deputy attorney general who is going to plead the accusation and try the case.[171] To understand the commonsense problems with this absence of communication, imagine a football team playing without a huddle or any other play calling, such that the wide receivers and running backs have to guess where the quarterback wants them to go. A common complaint from HQE attorneys *and* MBC investigators is that "we aren't on the same page" in many aspects of the investigation and prosecution process — typically because there has been little communication or coordination during key stages of the process.

This startling lack of teamwork and coordination throughout the life of a case leads to wasted efforts, inefficiencies, and last-minute requests for additional investigation when cases are nearing administrative hearing. In terms of inefficiencies, the DIDO program often requires *three* DAGs to sequentially review and learn a case: (1) the initial DIDO for acceptance of the case and sometimes initial pleading; (2) the supervising DAG for review and assignment; and (3) the trial DAG for pleading (or pleading amendments) and prosecution. Many DAGs and investigators interviewed see this multi-layered process as redundant and wasteful of limited DAG resources.

■ **Unclear and frustrating working relationships**. The present DIDO system often involves a poorly delineated system of voluntary advice or "informal" assistance by the visiting

[171] DIDO DAGs in certain district offices, primarily located in southern California, sometimes draft the accusations resulting from district office investigations, but this system still results in little or no contact between the key investigator and the actual trial lawyer. This approach often results in duplicative efforts and the necessity of amended accusations.

DIDO DAG to the field investigators. Some DIDOs are able to add considerable value by legal advice and assistance by virtue of their own personalities and initiative; others, we are told, seem unwilling and add very little to the process; and still others are simply not often consulted by investigators and medical consultants. The absence of clear roles and functions for the DIDO DAGs *vis a vis* investigators and supervisors leads to frequent confusion, frustration, and — occasionally — a breakdown of cooperation. DIDO DAGs without a clear role and mandate often add little value; investigators, unsure of the function of the DIDO, are often confused as to "who's my boss?" — that is, whether to listen to their own supervisors or the DIDO DAGs — and this engenders problems and frictions. Investigators, supervising investigators, and DIDO DAGs all told us there are "too many chefs in the kitchen" and that the chain of command is unclear. That these roles vary widely from district office to district office, and by region, only adds to the confusion. Under the DIDO program, which features DAGs in primarily "advisory" roles, there is no accountability or clear team structure to ensure cooperation and coordination of efforts between investigators and attorneys.

■ **No joint investigative plan.** A simple street crime investigation demands no special knowledge or elaborate investigative plan — an interview or two for the simple elements of the offense, a few items of physical evidence for exhibits, or a single lab test may suffice. But in complex disciplinary matters involving highly technical medical questions and challenging legal standards, a careful investigative plan addressing all issues and contingencies is often the key to success. The present hand-off model virtually guarantees that the trial DAG cannot participate in the initial investigative planning, and forces even highly skilled peace officers to have to speculate on the issues and facts the trial deputy may need or face.

■ **Inadequate follow-up and trial assistance**. The hand-off model often leads to inadequate investigative follow-up and hearing assistance. HQE attorneys cite many instances where the trial DAG facing an upcoming hearing date often must use a cumbersome and inappropriate "request for supplemental investigation" process, directed to the original Senior Investigator or the Supervising Investigator I, in order to obtain essential follow-up investigative work. And most DAGs lament the absence of a true investigating officer to assist at the administrative hearing.

Even street crime prosecutors working on non-complex matters generally have the full assistance of a trained "IO" (investigating officer) during the immediate pre-trial and trial phases. Anyone who has tried cases in the pressure cooker of the adversary process understands the value of having two competent professionals available to share tasks and emergencies, handle witnesses, address last-minute evidentiary or legal issues, and provide independent judgment. The adage "two heads are better than one" is nowhere more true than in a live-witness contested trial.

HQE attorneys often have examples of fine post-accusation assistance from particular MBC investigators, but usually have many more experiences of frustration in working through the MBC

bureaucracy to get a follow-up interview or other task completed. We ask our HQE prosecutors to work without investigator assistance in trying a complicated medical case when we don't ask a deputy city attorney to try a two-hour misdemeanor without the IO there to assist.

- **Reduced commitment to cases**. Even with the DIDO program in place, the failure to implement a true team model undermines the potential for commitment and dedication to the cases. This contrasts with an integrated team approach, where each teammate knows his/her role, knows who to look to for continuing leadership, and views the team's success as his/her own. The value of continuing personal commitment to cases is considered a critical personnel reason for the vertical prosecution model. If my primary concern as an investigator is to close cases quickly to meet a numeric performance standard, then I have little or no lasting commitment to the case or its ultimate success at hearing. I have small personal stake in the case itself or the team of professionals handling it. The assembly line moves past me rapidly; I cannot invest a personal commitment in the end product, since I only add pieces on the conveyor belt as it speeds on to someone else, and I seldom see the end result.

Managing professionals is often the challenge of providing correct incentives for excellence. Where a professional believes his or her success is tied to the success of his team and its case, that professional is personally motivated in a way that no hand-off process can provide.

- **Missed training opportunities.** The "hand-off" model also means MBC investigators miss perhaps the single most valuable training opportunity for improving field work: seeing the fruits of the investigation withstand the rigors of an administrative hearing. It is difficult to overstate the benefits of this experience for any investigator, as only an actual trial can fully illuminate the importance of sound interview techniques, evidence foundation and organization, anticipation of defenses and cross-examination strategies, and numerous other aspects of the investigative process.

This report takes no issue with the good faith of those who have designed and implemented the DIDO program, or with the many DAGs who have served ably in that role. But the experiment with the DIDO program to date indicates that the time for such halfway measures is past. In actual practice, the DIDO program has been insufficient to fully address the fundamental inefficiencies of what remains a "hand-off" model of prosecution. With a few noteworthy exceptions, the DIDO measure has not succeeded in providing the benefits of genuine teamwork. Investigators still proceed largely on their own; they still make what amount to legal/strategic decisions about witness interviews and documentary evidence without close legal support or the involvement of the attorney who must plead and try the case; and many still view the act of transmitting the case to HQE as the end of their real involvement in the matter. Just as unfortunate, the current system deprives HQE deputies of the enormous benefit of the continuing insights of the field investigator closest to the witnesses and facts, and deprives the trial attorneys of true "IOs" (investigating officers) to assist in the all-important pre-hearing and hearing phases of the enforcement process.

In sum, the DIDO program "halfway house" has helped, but has never delivered the efficiencies and benefits of a true investigator/prosecutor team. It has also led to "who's my boss?" confusion and poorly defined and uncomfortable relationships between MBC staff and HQE attorneys. *Code Blue*'s 1989 recommendation is even more compelling today: the basic working model of the current MBC and HQE cooperative process is inherently flawed and should be replaced with the investigation/prosecution model best suited to complex regulatory casework.

The vertical prosecution model. In many — and perhaps most — other law enforcement agencies involved in complex matters, prosecutors and investigators work together in teams from the day a case is assigned for investigation, in a process known as the "vertical prosecution model" for enforcement actions.[172] The vertical prosecution model is based on the realization that this process is an inherently *legal* one: The purpose of these complex investigations is to *prepare cases for trial* or other legal disposition — a function which requires legal input and which benefits from having that guidance and assistance from its inception.

Under this model, the trial attorney and the investigator are assigned as the team to handle a complex case as soon as it is opened as a formal investigation. The "team" approach of this model generally refers to a team assembled for *the case at hand* — all the benefits of teamwork can be accrued this way, and it is not necessary that attorneys and investigators be assigned to one another for other matters. Indeed, most offices choose to form different teams for different cases, thus maximizing training and the development of multiple working relationships.

Under this model, the prosecutor and the investigator work together during the investigative phase to develop the investigative plan and ensure the gathering of necessary evidence to prove the elements of the offense and to address anticipated legal defenses; provide legal analysis of the incoming evidence to help shape the direction of the case; prepare subpoenas or help secure search warrants to prod uncooperative subjects or third-party witnesses; deal directly with defense attorneys when issues arise; and address settlement or plea matters, which often appear early in such cases.

In turn, the investigator contributes a peace officer's experience and insight into the investigative plan and case strategy, and performs the field investigative tasks, including identification and location of witnesses and subjects; interviews of witnesses and subjects; obtaining and participating in the review of documentary and technical evidence; accessing criminal history and other databases; identifying and assisting with experts; planning and executing undercover

[172] The term "vertical prosecution" is a reference to the continuous involvement of attorney and investigator team members as a case works it work its way up through the investigation and prosecution process, which is often visualized as a vertical chain of events beginning with investigation, and proceeding to pleading, preliminary examinations or hearings, pre-trial motions, trial, and appeal(s). The principal alternative is a model where different prosecutors and investigators handle the case as it works its way up the chain of events.

operations; preparation of affidavits and specifications for search warrants, and service of those warrants; arrests and surrenders; witness assistance and evidentiary matters during trial; investigative report preparation; and other tasks usually associated with the work of trained peace officers and professional investigators.

It is critical to note that the vertical prosecution model works best where all participants recognize and respect the contributions of all team members, and where attorneys, investigators, and other team members perform the functions for which they are trained and best suited.[173] Investigators in a vertical prosecution team are responsible for the tasks which are appropriately theirs, including essentially all the field investigative tasks involving witnesses, evidence, and related procedures. Prosecutors in a vertical prosecution team perform the tasks for which they are trained and licensed, including the legal analysis and advocacy essential to preparing evidence for trial and presenting that evidence at trial.

Because the intrinsic goal of this process is a trial of the agency's charges, most vertical prosecution teams are led by the prosecutor assigned as the lead trial attorney. This does not relegate investigators or any other team members to a position of lesser dignity or importance, and vertical prosecution teams work well only where the professional contributions of all participants are appreciated and respected. No team can succeed without the contributions of *every* team member, and mutual respect and professional colleagueship are essential to the team's goals. Sports teams provide a useful analogy here: There can only be one quarterback on a football team, and the quarterback generally calls the plays. But the plays — and the team as a whole — will fail without the equally valuable contributions of each lineman and back.

A number of different organizational structures or formats can be used to achieve the benefits of vertical prosecution. However, the essential elements of any such model are:

- **Early coordination** of the efforts of attorneys, investigators, and other staff;

- **Continuity of teamwork** throughout the life of a case;

- **Mutual respect** for the importance of the professional contributions of both attorneys and investigators, and the value of having both available in all stages of the case; and

[173] There are sound reasons of law and policy to maintain the distinctions between the activities of attorneys and investigators in this process. Issues of prosecutorial immunity are implicated when an attorney moves beyond the tasks related to the advocacy function, making it important to preserve appropriate roles. *See Imbler v. Pachtman* (1976) 424 U.S. 409; *Buckley v. FitzSimmons* (1993) 509 U.S. 259; *Genzler v. Longanbach* (9th Cir. 2004) ___ F.3d ___, 2004 Daily Journal D.A.R. 12,027 (Sept. 27, 2004). Although this concern is significant and appropriate, it is clearly manageable with proper attention to professional roles, as indicated by the continuing success of the vertical prosecution approach in a large number of federal, state, and local law enforcement agencies, including the examples discussed below in this section.

■ **Early designation of trial counsel**, recognizing that the prosecutor who ultimately puts on the case must be assigned from the case's inception to help shape and guide it because the purpose of any investigation is the *preparation of a case for trial*.

The precise implementation of these essential elements is flexible. For example, this model is generally best implemented by an organizational structure where the attorney and investigator staff are employees of the same agency. However, this approach can also succeed where the team members work for different organizations, although the coordination effort may be somewhat greater. Even for those vertical teams working within the same organization, there can be separate administrative or personnel systems, with team members reporting to different supervisors, as long as there is a common institutional commitment to the team concept. This model benefits from housing the team members in the same location, but it can be implemented even without that advantage. However, the essential components of early and continuous teamwork throughout the life of the case are present in all vertical prosecution systems.

The continuity element is arguably the most important. Complex cases — such as medical licensing disciplinary matters — change and evolve during the investigation and trial process. New leads, additional witnesses or victims, expert or other witness impeachment materials, and numerous other follow-up tasks are often vital to preparation of such matters for trial. Only a team which has put together a case from its inception is well-equipped to adjust the prosecution effort as required for success.

Like any human system, success in a vertical prosecution format is ultimately dependent on the thoughtful and balanced way it is implemented. In bringing together professionals with differing skills, it is critical to make the best use of all types of professional competence, and equally vital to preserve the morale and self-esteem of all participants. "Teamwork" in this context is based on mutual respect and colleagueship. Teamwork doesn't mean attorneys become dictatorial or inflexible, and teamwork doesn't mean investigators lose reasonable professional independence in handling their fieldwork or are asked to do tasks beneath their job descriptions. The proof that all such concerns can be readily addressed is the fact that so many agencies employ this teamwork approach with great and lasting success. A properly formed and operated vertical prosecution team is a tightly knit and smoothly functioning elite unit with high morale and a track record of success.

The present MBC/HQE hand-off system does not bring the vital professionals together in a team of this kind, and the result is a less effective and less efficient disciplinary process.

Precedents for the vertical prosecution model at other agencies. Vertical prosecution is widely used as the organizational principle for specialized or complex law enforcement cases. Examples of other major agencies employing the vertical prosecution model include:

■ **Federal agencies.** Analogous complex casework is routinely handled by federal agencies in a vertical or team system. The U.S. Department of Justice's white collar crime divisions, such as the Antitrust Division, assemble teams of deputies attorney general, investigators, analysts, and economists to handle complex antitrust matters from initial inquiry through grand jury investigation and charging, to trial and appeal. Federal regulatory agencies, such as the Federal Trade Commission and the Securities Exchange Commission, regularly assign teams of professionals and support staff to specific cases or investigations. For example, FTC "consumer protection specialists" who perform functions essentially identical to those of MBC investigators are assigned, along with trial attorney staff, at the outset of every formal investigation in the FTC's eight regional offices.

■ **State agencies.** California and other states make extensive use of the vertical prosecution model for complex law enforcement casework. In what is perhaps the closest agency analogy to MBC's disciplinary system, the State Bar of California adopted the vertical prosecution model in January 2002 for its enforcement program, and has found it so successful that the program is presently being expanded.[174] In the State Bar system, deputy trial counsel and State Bar investigators are formed into teams working together from moment a complaint is converted from an inquiry into a formal investigation. (Interestingly, the State Bar system has also adopted the teamwork approach for two major case/rapid response teams (in northern and southern California) it has organized for the purpose of "identifying those respondents who constitute the most serious and immediate threat of harm to the public and focusing dedicated staff resources for a swift investigation and prosecution against them."[175])

It is significant that other California regulatory boards and bureaus already enjoy at least some of the benefits of the vertical prosecution model by virtue of the policies of the Department of Consumer Affairs' Division of Investigation. In administrative hearings conducted for other boards and bureaus by the Licensing Section of the Attorney General's Office, the Division of Investigation frequently makes its investigators available to serve as investigating officers working with the trial DAGs. Investigators thus follow their cases through the litigation process and provide team support for the trial attorneys in their cases. This is a key component and benefit of the team model, and this system has worked well for DCA.

It should also be noted that the California Department of Justice has ample previous experience with the vertical prosecution model, having successfully applied it in such units as the Medi-Cal Fraud Section, the Special Prosecutions Unit, and the Major Fraud Section (operated in the 1980s).

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[174] *See 2002 Report on the State Bar of California Disciplinary System* (April 2003) at 14–16.

[175] *Id.*

■ **Local agencies.** Nowhere is the adoption of the vertical prosecution model more complete and successful than in the offices of the district attorneys of California, which prosecute nearly all the complex felonies in the state and many of the civil law enforcement actions brought in such areas as consumer protection, antitrust, and environmental protection. The Los Angeles District Attorney's Office — the nation's largest local prosecutor's office with nearly 1,000 prosecutors and more than 260 peace officer investigators — has applied the vertical prosecution model to specialized and complex cases since 1954, when the Office formed its first vertical prosecution unit, the Major Fraud Division. Today, 39 special divisions and sections — comprising more than 150 prosecutors and 70 investigators — handle all of the most complex prosecutions for the office. Each of these units operates in a vertical prosecution mode, with case teams consisting of deputy district attorneys, investigators, and other specialists (such as forensic accountants) working collaboratively throughout the life of each case. More than 40 of the 58 district attorneys' offices in California maintain specialty consumer protection, major fraud, and environmental law sections, and *all* of these prosecution units work with in-house investigators in a vertical prosecution format.

The universal success of the vertical prosecution approach, and its widespread adoption by federal, state, and local agencies doing this form of work, argue persuasively for the application of this principle to the complex disciplinary proceedings of the Medical Board.

Application of the vertical prosecution model to MBC. In the specific context of California's medical regulatory system, the benefits of vertical prosecution — featuring a closer and better working relationship between MBC investigators and HQE prosecutors — would be numerous and substantial:

■ **Improved efficiency and effectiveness arising from better communication and coordination of efforts**. Vertical prosecution would enable the HQE prosecutor and the MBC investigator to communicate often and work together to coordinate their activities (although this does not require daily contact or full-time assignment to any individual case or team). Unlike the present system, this model would permit the trial DAG to invest in his or her case early; guide its investigation based on joint attorney and investigator input into the investigative plan; assist the investigator with medical records requests and enforcement; provide early ISO/TRO analysis and litigation (as needed); participate in the selection of the expert and identification of documents and records that should go to the expert (who will be one of the prosecutor's key witnesses at hearing); and identify at an early stage weak or problematical cases which should be subject to dismissal or early settlement.

■ **Reduced case cycle times**. Case timeframes will shorten as prosecutors become more available for and more committed to early records procurement and other evidence gathering; prompt preliminary relief, such as ISOs, in appropriate cases; and early case evaluation (leading to earlier case disposition).

■ **Improved commitment to cases**. Vertical prosecution has undeniable benefits in terms of promoting a sense of investment in and commitment to cases. MBC investigators and HQE attorneys will be no different from their counterparts in other agencies: Personal involvement with the ultimate disciplinary outcome will generate greater commitment to that outcome. This is both sound organizational theory and simple human nature. We care about something more if it is "ours." It is axiomatic in prosecution management that the attorney who helps work up the case is the attorney who will be the most committed to the case at trial. The best of hand-off cases still suffers from the hand-off.

■ **Improved morale, recruitment, and retention**. These benefits will accrue from greater efficiency of operations and the greater sense of professional accomplishment which naturally flows from successful team results and following cases through to disciplinary conclusion. In particular, if a transfer of MBC investigators to the Department of Justice is the chosen vehicle for the vertical prosecution system, the added prestige of Special Agent status and the resulting higher salary for former MBC peace officers would help with the current problems of recruiting top quality investigators and retaining the precious skills of experienced medical investigators.

■ **Improved training for investigators and prosecutors.** Practical training for both kinds of professionals would be enormously improved. Trial attorneys would gain a greater appreciation for the challenges of the investigative process. And through direct participation in the actual pre-trial and trial process, investigators will achieve a much better understanding of the significance of legal strategies, evidence issues, interview techniques, and witness selection and preparation. Mutual training can only benefit both types of staff, and — in particular — participating in the administrative hearing process will do more for enhancing investigative skills than any other single form of training.

■ **Potential for improved perception of the fairness of the process**. A vertical prosecution system, especially one which unifies MBC's investigators with the Department of Justice HQE staff, would improve the public perception of the independence and integrity of the enforcement process. This would address the concern, expressed periodically by public critics of MBC and by studies such as the CHP audit in 1993, that MBC investigations are subject to political pressures or undue influence by the physician-dominated Board.[176] (This benefit would accrue only if the structural implementation of the vertical prosecution model entails the transfer of MBC investigators to another agency.)

In sum, the benefits of the vertical prosecution model — including closer cooperation, optimum use of the different professional skills of attorneys and peace officers, continuous mutual

[176] *See supra* Ch.IV.D.; California Highway Patrol, Bureau of Internal Affairs, *Administrative Investigation of the Medical Board of California (Preliminary Report)* (Jan. 11, 1993).

training, and improved morale and investment in case outcomes — are substantial and have been proven in numerous other regulatory and law enforcement agencies. Vertical prosecution is not a novel concept with uncertain application; it is the mainstream of modern law enforcement philosophy in complex white collar crime matters and this is increasingly true for disciplinary agencies also, such as the State Bar of California. Nor is vertical prosecution a new recommendation for the Medical Board. Fifteen years ago, *Code Blue* concluded: "Where cases are complex, as is often the case, it is necessary to have the person who must conduct the hearing and the person who must gather the evidence working together from the start."[177] In order to raise its enforcement performance to the next level, MBC must move into the mainstream of law enforcement and apply the vertical prosecution model to physician discipline cases in California.

3. Delays in medical records procurement are chronic.

The lengthy waiting time for the procurement of essential medical records is among the greatest problems facing the MBC district offices and among the principal sources of overall case processing delays. Monitor interviews consistently found this problem of paramount concern among MBC investigators, who described it as the "biggest problem for MBC investigations," "a major issue for all district offices," and the "single greatest source of delay" in the disciplinary process.

Medical Board staff report that in fiscal year 2003–04, the average timeframe from a request for records by MBC investigators to receipt of all records was *74 days* (or two and one-half months), despite the statutory 15-day time frame in Business and Professions Code sections 2225 and 2225.5, and despite the fact that failure to comply with such records requests is unprofessional conduct and subject to disciplinary action and fines of up to $1,000 per day.[178] This 74-day average investigative timeframe is in addition to the average 66-day period that CCU spends in records-gathering in QC cases (see Chapter VI.B.2 above). In sum, medical records procurement consumes an average of 140 days — or 77% of the 180-day goal established in section 2319.

At both CCU and the district offices, there is a tradition in which both investigators and HQE prosecutors demonstrate apparent tolerance for physicians' lengthy delays in complying with medical records requests. Requests for assistance to the Attorney General by either CCU staff or district office investigators are comparatively infrequent, and actual enforcement actions are even less frequent. According to HQE management, only 22 subpoena enforcement actions were brought by

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[177] Center for Public Interest Law, *Physician Discipline in California: A Code Blue Emergency* (Apr. 5, 1989), at 68.

[178] Business and Professions Code section 2225(d) requires, in pertinent part: "Where documents are requested from licensees . . . they shall be provided within *15 days of receipt* of the request, unless the licensee is unable to provide the documents within this time period for good cause. Failure to produce the requested documents or copies thereof . . . shall constitute *unprofessional conduct*" (emphases added). *See also id.* at § 2225.5(a) and (d).

HQE on MBC's behalf in fiscal year 2001–02, and 17 such actions were brought in 2002–03. Similarly, HQE brought three actions for sanctions for delay in records production (pursuant to Business and Professions Code section 2225.5) in 2001–02, and about ten such actions in 2002–03. Although documents were ultimately obtained in these matters, after varying delays, only two of these actions successfully obtained monetary sanctions. MBC investigators report that serious delays in records procurement are pervasive in the 1800-plus investigations handled each year, making it difficult to understand how 19 subpoena enforcement actions and a half dozen sanction actions (most without sanctions ordered) are sufficient to address this problem each year.

A fairly typical scenario today is for the investigator to request records, then wait, then request again, then wait, then use jawboning tactics or repeat phone calls, and wait some more, then perhaps request again or go to the physician's office with a copy of the patient's release to attempt immediate access. If no records are forthcoming, the investigator may prepare a records subpoena and declaration in support, and then serve it. If the subpoena is ignored, the investigator may seek to persuade the appropriate DAG to prepare and file a subpoena enforcement action, as described above.

Most MBC investigators report that this scenario — or variations on it — ultimately results in the production of the relevant medical records in the course of time. However, virtually all interviewed investigators reported frustration with the inherent waiting periods and delays, and with the absence of a consistent program of records procurement enforcement. In such a process, it is not difficult to identify where two months' worth of delay (between the 15-day statutory deadline and the 74-day average) creeps steadily in.

Alternatives to the present practice have been utilized periodically or may be available for use. For example, MBC investigators occasionally execute warrantless searches where they have obtained the patient's release; additionally, they can in certain cases use the administrative inspection warrant authority found in Code of Civil Procedure section 1822.5, as was undertaken successfully by Medical Board and district attorney staff in the 1995 investigation in *People v. Bosley Medical Group, Inc*.[179] However, these tactics have until now represented extremely rare exceptions to the usual records procurement process.

4. Subject interview policies are inconsistent and ineffective.

Medical Board investigators regularly conduct subject interviews as a key part of the district office investigative process. The *Enforcement Operations Manual* requires MBC investigators to attempt to interview all subject physicians prior to transmitting a case to HQE for disciplinary

[179] LA Super. Ct. No. BC 159287.

action.[180] Many physicians voluntarily consent to be interviewed, and appear at district offices for that purpose. If a physician subject declines to be interviewed, the Medical Board is authorized to issue an investigational subpoena for testimony, sometimes known as an administrative subpoena, under the general administrative subpoena authority granted to the Attorney General and various department chiefs, including the Director of the Department of Consumer Affairs, pursuant to Government Code section 11180 *et seq*.

Pursuant to the *Enforcement Operations Manual*, the decision to issue such an investigational subpoena is made on a case-by-case basis, depending on the factual circumstances of the case.[181] The relevant Supervising Investigator II has the delegated authority to make this decision on behalf of MBC, and that supervisor makes a joint decision with the appropriate attorney from HQE.

It is the position of the Office of the Attorney General that the use of an administrative subpoena under section 11180 *et seq*. confers on the Board the right to place the witness under oath and the right to record his or her statements.[182]

In practice, there is much inconsistency among district offices and MBC investigators regarding the use and conduct of these subject interviews. All investigators seek to conduct these interviews in cases where transmittal to HQE is anticipated, but practices vary considerably beyond that point. Some district office investigators rely primarily on persuasion to obtain subject consent to the interview, and only rarely resort to the administrative subpoena authority. Other district offices follow a more formalized practice of seeking voluntary interviews but routinely issuing subpoenas to compel testimony upon encountering delay or reluctance. Some investigators routinely tape record, or seek to record, these subject interviews; others do not, or do not insist if there is an objection from the subject or defense counsel.

The Monitor believes the more permissive interview policy and the statewide inconsistencies together impede the efficiency of MBC investigations. The policy of informal persuasion, voluntary requests, and waiting for cooperation contributes significantly to the problem of excessive case cycle times. The current average time between initial request and actual subject interview is 60 days for the district offices as a whole, which represents a large portion of the typical nine-month investigative timeframe.[183] Consistent with courtesy and professionalism, a reasonable opportunity for voluntary cooperation should certainly be extended to a licensed physician, but a timeframe of

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[180] Medical Board of California, *Enforcement Operations Manual* (Rev. 1/03), Ch. 6, at § 6.2.

[181] *Id.* at Ch. 5, at § 5.3.

[182] *Id.*

[183] Source: Medical Board of California staff (Sept. 10, 2004).

15–30 days should be the outside boundary of such courtesy. The prompt use of the administrative subpoena authority, after a reasonable interval for cooperation, has worked well in certain of the district offices and commends itself for use statewide.

Similarly, a casual or relaxed policy with regard to tape recording of interviews encourages physicians and their counsel to object or attempt to set unreasonable constraints. Most investigators and detectives in law enforcement today make routine use of modern digital tape recording technology in suspect or witness interviews. Current technology produces excellent and easily usable recordings and minimizes previous objections to more primitive recordings. The Monitor shares the mainstream view that tape recording improves the accuracy and reliability of interviews and subsequent reports, forestalls later misunderstandings and disputes, and protects the interests of *both* parties by ensuring a high-quality record of what took place in the interview is available to both sides. Sound public policy calls for subject interview recording in most if not all circumstances today.

Inconsistency of practice among the various district offices also undermines the overall success of the MBC investigative process. Consistency of practice is superior on grounds of fair and equal treatment of all subjects. But it is also crucial to establishing a clear understanding of the policies and ground rules of the MBC investigative process within the community of physicians and their counsel. This minimizes misunderstandings and disputes, and encourages cooperation based on secure knowledge of the requirements of the Medical Board. A policy of early and adequate subject interviews, firmly and consistently enforced by subpoena as necessary, speeds the investigative process and promotes prompt decisionmaking, which is ultimately in the interests of all parties.

To the extent that current subpoena authority, or authority to record interviews, is perceived as unclear, consideration should be given to statutory changes to clarify the specific authority of the Medical Board. The regulatory procedures of other California agencies[184] and other states[185] provide specific interview authority for medical boards, and could serve as a model if further clarification of the general authority of Government Code section 11180 is desirable. In addition, existing statutory requirements regarding records production could be expanded to include physician interviews among the required forms of physician cooperation with MBC disciplinary inquiries (in a manner analogous to the equivalent requirement of cooperation imposed on California attorneys by Business and Professions Code section 6068(i)).

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[184] The California Board of Accountancy has direct subpoena authority under Business and Professions Code section 5108.

[185] *See, e.g.*, Ariz. Gen. Stat. 32-1451(C), providing specific authority for the Arizona medical board to order "investigational interviews between representatives of the board and the doctor" in the conduct of its investigations.

5. Medical consultant availability, training, and utilization are inadequate.

Medical consultants play a vital and varied role in the Medical Board's complaint handling and investigation process. The Monitor believes problems of medical consultant availability, training, and proper use contribute significantly to lengthy investigations and inefficient operations.

Medical consultant availability is largely a function of the Board's budget for this important form of consulting assistance. The budget for medical consulting hours suffered a 15% reduction in the 2003–04 fiscal year, reducing total available consultant hours agency-wide from 16,500 to 14,025. District office staff were unanimous in their view that these reductions made it more difficult to obtain required medical consultant assistance, exacerbating a situation of reduced investigator and support staff, and requiring unproductive down time in cases waiting for consultant attention.

In particular, these reductions often mean that medical consultants are unavailable for or greatly delayed in reviewing expert opinions and participating in the decision to transmit cases. Some offices report that this function is hardly performed at all by assigned consultants. This aspect of the medical consultant's function is among the most important of all, and is central to the speed and quality of QC case processing. Delays or problems with this critical function translate directly into overall case delays and negatively affect quality of decisionmaking on these cases. We heard numerous variations on one supervisor's comment that "QC cases are consistently getting delayed because of decreased medical consultant hours." There is universal recognition that the district offices need more medical consultant assistance, whether by increasing the number of available consultants or increasing the hours of existing ones. Consideration may need to be given to a return to the full-time medical consultant program if the part-time model cannot be funded and staffed to avoid chronic shortages of this essential component of the process.

Other concerns about medical consultant practices merit the attention of the Medical Board:

- Medical consultants and investigators both expressed concern that medical consultants in the CCU and the district offices may have inadequate information about prior complaints and inquiries in order to identify patterns of misconduct by subject physicians, making it more difficult to correctly assess the viability of a complaint in the district offices.

- Another issue relates to the medical consultants' important function of identification and recruitment of physicians to serve as expert reviewers in MBC disciplinary matters. Expert reviewer availability remains a critical concern, and medical consultants might be used more systematically to reach out to their respective medical communities to encourage more participation in the expert

reviewer program. This is especially critical for those specialty areas, such as neurology and obstetrics/gynecology, where expert scarcity is causing significant delay.

■ Improved management of the medical consultant program calls for improvements to the MBC management information system in this regard. Today, MBC is not adequately tracking medical consultant report preparation timeframes, making it even more difficult to correctly allocate resources to the medical consultant program and avoid queuing for consultant assistance in the district offices.

■ Both medical consultants and investigators are troubled by the demise of previous efforts to train new medical consultants in the procedures of MBC and the efficient performance of the medical consultant function. In a related issue, the medical consultant procedure manual has not been updated since 1996, and is not itself a consistent and comprehensive guide but rather a collection of memos and individual documents without effective organization.

■ An additional concern relates to medical consultant compliance with the job classification requirement of active practice in five of the last seven years. Several medical consultants currently on staff have been fully retired from medical practice for more than two years and thus cannot now meet the technical requirement of the classification. Review or revision of the classification may be in order, but consideration should be given to the present issue of noncompliance.

6. Expert witness availability and use are systemic weaknesses.

Expert witness availability, use, and performance are together identified by district office staff as one of the two principal challenges to quick and efficient casework. Investigators lament the unavailability of experts, especially in highly specialized fields, the inadequacy of training provided to experts, and the inconsistent performance and uses made of these experts. These concerns are addressed in detail in Chapter VIII below.

7. Ongoing training of investigators, medical consultants, and experts is inadequate.

MBC's investigators are an experienced and professional group of peace officers, and MBC's two dozen medical consultants and more than 750 expert reviewers include many professionals of outstanding regulatory experience. However, the Monitor has heard numerous concerns from many of MBC's own investigators and medical consultants lamenting the dramatic curtailment of the previous program of continuing specialized training for these staff members. MBC, which in years past has had an exemplary training program in place, has substantially reduced formal training for investigators, medical consultants, experts, and others, as an accommodation to pressing budgetary concerns.

Perhaps by necessity, MBC has viewed continuing specialized training as a luxury which can be jettisoned during difficult budgetary times. But if MBC is to significantly improve its case cycle times and efficiency, a systematic and professionalized training program for its field investigators, medical consultants, and expert reviewers is required. And as with any such large organization, training efforts will be viewed as important and meaningful only if there is a commitment to ongoing training and its importance at the highest management levels.

8. Coordination with state and local prosecutors is underutilized.

Many of MBC's peace officer investigators have substantial knowledge of the criminal and civil law enforcement options available to the agency as potential tools to address complaints against medical practitioners involving both quality of care and physician conduct issues. However, prosecutors throughout the state have raised the issue of the inadequacy of early communication or consistent coordination between MBC investigators and state and local law enforcement agencies in cases where non-administrative enforcement tools may be appropriate.

Numerous prosecutors in some of the largest offices in the state report they have received few or no cases referred from MBC investigators for criminal prosecution or civil unfair competition/false advertising/unlawful practices enforcement. Some of the larger offices have seen "one or two" such referrals in the past decade. MBC statistics support these observations: Only 37 MBC cases were referred by staff investigators for criminal prosecution in 2003–04, or about one for every million citizens in California. It is difficult to view that as the likely number of criminal matters involving 37 million Californians who generated 8,000+ complaints to MBC last year. And most state and local officials interviewed were unable to recall a single instance of a business practices matter — such as fraud or false advertising — being referred by MBC, notwithstanding that professional conduct matters amount to more than 50% of all complaints received by the Medical Board. Prosecutors in certain counties reported that even complaints of unlicensed practice, which should be frequently forwarded to those agencies, are rarely received from MBC staff.

Similarly, MBC investigators report inconsistencies in the responses they receive from the various law enforcement agencies throughout the state. Some investigators recounted frustration at the law enforcement priorities and expressions of disinterest on the parts of busy city and county prosecutors.

Clearly there are criminal and civil enforcement matters arising in MBC investigations which could profitably be shared with state and local prosecutors. Increased early case cooperation in appropriate types of investigations can only benefit all concerned agencies.

There is today very little in the way of a formal communication protocol between local prosecutors and non-licensing state prosecutors, and opportunities for increased efficiency and

effectiveness are being missed. A key example is the pattern of limited use of the powerful Penal Code section 23 license sanction procedure. Many prosecutors and court officials are unfamiliar with the Penal Code section 23 process, and numerous appropriate cases for quick and efficient license sanctions are missed today. A one-hour hearing may take the place of an 18-month administrative process, and yet many such opportunities go unexploited, according to sources at MBC and local law enforcement agencies.

Occupational licensing agencies, such as MBC, and state and local prosecutors have a mutual obligation to work together smoothly and consistently to better serve the public. High quality communication among investigators and prosecutors who handle medical licensee cases — both during cases and between cases — requires consistent effort, but pays real dividends in increased enforcement effectiveness.

9. Recruitment and retention problems exacerbate MBC personnel shortages.

Recruitment and retention problems plague personnel management at the Medical Board. Supervisors and field investigators uniformly report that valuable, experienced investigators are lost and well-qualified applicants go elsewhere because of salary disparities between the pay of MBC and other agencies hiring peace officers. These disparities are inconsistent with the express intention of the Legislature in SB 2375 (Presley) to the effect that "the pay scales for investigators of the Medical Board of California be equivalent to the pay scales for special investigative agents of the Department of Justice, in order to attract and retain experienced investigators."[186]

Earlier efforts to reduce this disparity were initially successful but have now been eroded by subsequent developments. In 1991, all DCA investigators were reclassified to the "Investigator, DCA" pay classification which allow MBC to give its investigators a 10% pay differential above the prior level. For a period of time this gave MBC the ability to pay its investigators on a par with competing agencies hiring peace officers. But in the intervening years the competing agencies have raised their pay levels, while DCA has been unable to match these changes. Requests for recruitment and retention pay, geographic pay, and related increases have been rejected by Department of Personnel Administration.

Today, substantial pay differentials once again place MBC at a hiring and retention disadvantage, especially at the top steps of the senior investigator positions. Competing employers, such as the Department of Justice and the Department of Corrections, now can offer top step pay of between 10% and 15% more than MBC, making the Medical Board uncompetitive and encouraging

[186] SB 2375 (Presley), Cal.Stats.1990, c.1597.

a troubling outflow of the most experienced personnel.[187] This problem is especially acute in high-cost-of-living areas of the state, such as parts of Los Angeles and the Bay Area, because MBC offers no geographical pay differential. MBC regularly loses in competition with other agencies over highly qualified investigative personnel.

10. Procedural and training manuals must be updated continuously.

MBC investigations and other enforcement processes are today guided by policy and procedure manuals which in most cases have not been consistently reviewed or approved by HQE — MBC's legal counsel and principal partner in enforcement. In addition, at least some of these manuals have not been updated adequately by MBC management and thus are sufficiently outdated to be inaccurate as to Board policy.[188] In addition, certain enforcement functions have no true procedure manuals at all (including the important medical consultant function). As detailed further in Chapter V above, there is inadequate updating of many of these important guides and inadequate consistent legal review for all of them.

11. Investigators need full and easy access to all law enforcement databases and to appropriate commercial databases.

Access to computerized information sources and databases is among the most important of modern investigative tools, often permitting investigators to obtain in minutes what formerly took hours or days of painstaking data-gathering on criminal history, subject or witness addresses, and other background, employment, or business organization information and related matters.

MBC investigators interviewed by Monitor project staff complained of inconvenient access to the law enforcement databases which are essential to modern police work, including the Department of Justice's CLETS criminal history information system and DMV records. Inadequate or inconvenient terminal access was mentioned in several locations. MBC investigators also expressed dissatisfaction with budgetary or other limitations which in some cases prevented them from using commercial databases, such as Merlin, Westlaw/Dialog, and similar systems, which investigators in other California agencies are funded and permitted to use. These commercial systems often serve as cost-effective means of performing quick background work, and appropriate access would help speed district office investigations.

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[187] Source: Medical Board of California staff (Apr. 20, 2004).

[188] *See supra* Ch.V.B.3. MBC staff have made numerous updates to the *Enforcement Operations Manual*, which as a result is more comprehensive and current than other of MBC's manuals. But even with regard to the *EOM*, adequate HQE review is a continuing concern.

C. Initial Recommendations of the MBC Enforcement Monitor

Recommendation #22: MBC and HQE should fully implement the vertical prosecution model. MBC investigators and HQE prosecutors should work together in a true vertical prosecution system featuring case teams established at the initiation of the investigation and remaining together until the case is fully litigated or resolved. Investigators and prosecutors in these teams would continue to perform the professional tasks for which each is best suited, but all such efforts would be coordinated from the inception of each case to maximize efficiency and effectiveness. The Monitor believes the vertical prosecution system could best be implemented by merging existing MBC investigators and supervisors into HQE. However, this system could be otherwise effectuated through coordinated assignments to the case teams by the respective agencies. The precise organizational logistics of the vertical prosecution system are important and must be carefully planned, but even more important are the essential components of early and continuous coordination and teamwork among investigators and prosecutors throughout the enforcement process. The specifics of implementation should be finalized only after appropriate consultation with MBC and HQE management and staff, and other stakeholders, in order to tailor this prosecution model to all relevant circumstances.

Recommendation # 23: MBC and HQE must revise their medical records procurement and enforcement policy to ensure prompt and full compliance with existing law. As discussed in related Recommendation #7, MBC and HQE should adopt and strictly enforce a comprehensive medical records procurement policy which is consistently applied in all MBC enforcement cases. Under this policy, the assigned MBC investigator should make an appropriate records request, and allow no more than 30 days (twice the section 2225 statutory standard) before making a final request with a short compliance deadline. If all requested medical records are not received by that deadline, the case investigator and prosecutor should work together immediately to serve a subpoena with an appropriately short compliance period. A subject's failure to comply would result in immediate subpoena enforcement action, including a motion for section 2225.5 sanctions of $1,000 for each day of noncompliance. In egregious cases (such as continuous or repeated refusal to comply with a court order or requests for records), administrative action against the physician's license should be commenced, seeking suspension or revocation.

Vigorous and consistent statewide application of this policy may result in an initial increase in enforcement actions but will ultimately establish a well-understood community-wide standard of routine and prompt compliance with these lawful medical records requests. As MBC Enforcement Committee Chair Ronald Wender, MD, has recommended, MBC should have "a zero tolerance policy regarding obtaining records."[189]

[189] Ronald H. Wender, MD, Chair, MBC Enforcement Committee, *New Proposal for Reorganization of the Enforcement Program* (Oct. 7, 2002) at 2.

As necessary to fully implement this new and consistent policy, MBC and HQE should closely consider the following initiatives:

(1) Formation of a small "strike team" of prosecutors familiar with and skilled in subpoena preparation and enforcement actions to speed and improve HQE response to such problems;

(2) Clarifying or strengthening, as needed, the professional obligation of California physicians to comply with a lawful MBC request for medical records. Presently, section 2225(d) and section 2225.5(d) state that failure to comply with a lawful request for medical records is unprofessional conduct, and thus is subject to disciplinary action against the non-complying licensee. It may be beneficial to add a statutory provision affirmatively requiring physician cooperation with MBC disciplinary inquiries analogous to the requirements of attorneys under Business and Professions Code section 6068(i);

(3) The joint development of MBC/HQE protocols for the proper use of warrantless searches where patient releases have been obtained, and for the use of CCP section 1822.5 administrative inspection warrants in appropriate cases such as the *Bosley* matter described above; and

(4) An amendment to the Business and Professions Code to shift attorney's fees to the subjects of investigations when MBC and HQE must file subpoena enforcement actions and prevail in those actions.

Recommendation #24: MBC should develop and enforce a consistent new policy on physician interviews. Physician interviews should proceed in a prompt and orderly sequence of requests, subpoenas, and enforcement, as needed. Although existing statutory authority appears sound, consideration should be given to appropriate legislation requiring subject physicians to appear at interviews upon reasonable notice, and requiring tape-recording of interviews to ensure accuracy and fairness to all parties to the proceedings. As necessary, cooperation with this subject interview policy could be addressed in a clarified statutory duty of licensees to cooperate with MBC disciplinary inquiries, analogous to the obligation imposed on attorneys by Business and Professions Code section 6068(i).

Recommendation #25: MBC should improve cooperation and case referrals between its enforcement staff and state and local prosecutors involved in criminal and civil prosecutions. MBC should develop appropriate case selection and referral criteria, and establish effective inter-agency working relationships, to improve cooperation and mutual case referrals between MBC investigators and all levels of prosecutors, including those from the Attorney General's Office as well as district attorneys' offices and city attorneys' offices who actively bring criminal and civil enforcement actions against medical licensees.

Both quality of care cases and physician conduct cases can be of great interest to these non-HQE prosecutors, many of whose offices maintain consumer protection or fraud units (and even medico-legal units) which actively seek appropriate cases for criminal prosecution or civil unfair competition/unlawful business practice enforcement under Business and Professions Code sections 17200 and 17500 and related statutes. MBC should cultivate good working relationships with these prosecutors to promote mutual understanding of case selection criteria and to ensure smooth case referrals. This should be achieved by the participation of MBC staff, including CCU staff and investigators, as appropriate, in such activities as the frequent California District Attorneys Association meetings and conferences established for this purpose.[190]

In addition to cooperation and case referrals, improved coordination with both prosecutors and judges should be undertaken to assist in training on enforcement issues of mutual interest. For example, MBC and HQE staff should initiate an expanded training program for prosecutors and judges to improve familiarity with MBC's mandatory reporting statutes and the use of legal mechanisms such as Penal Code section 23 actions, many of which are underutilized today.

Recommendation # 26: MBC should continue its efforts to restore lost investigative resources to provide staff for special projects and major case response teams. The Monitor recommends restoration of the nineteen peace officer positions and ten additional enforcement program positions which the Medical Board has lost over the past three years. Reinstatement of lost investigator positions should be sought to enable MBC to undertake proactive and undercover operations, such as the Operation Safe Medicine and the Internet Crimes Unit, which are initiatives of great public safety importance but which have been drastically curtailed as a function of personnel reductions and resource prioritization.

In addition to those proactive operations, the Monitor believes restored investigator staff should be directed to the formation of two rapid response teams, located in southern and northern California, to handle major cases of unusual complexity and emergency matters with potential for serious health or safety consequences. The task force concept of past years should be revisited to improve MBC's quick-reaction capacity in these exigent matters, which often require an immediate infusion of skilled investigative and prosecutor resources to prevent public harm and achieve quick legal remedies such as interim suspension orders or temporary restraining orders. Enforcement Committee Chair Ronald Wender, MD, has endorsed the establishment of such strike teams in northern and southern California, concluding "[t]he result would be increased efficiency and greater public protection."[191]

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[190] Bi-monthly meetings of CDAA's Consumer Protection Council, held in both northern and southern California, are examples of existing opportunities to meet prosecutors and develop these working relationships.

[191] Ronald H. Wender, MD, Chair, MBC Enforcement Committee, *New Proposal for Reorganization of the Enforcement Program* (Oct. 7, 2002) at 5.

Improvements in MBC investigator pay scales would similarly assist in restoring MBC investigator staff to levels necessary to expand its special projects and rapid response teams and reduce case cycle times.

Recommendation #27: MBC should improve and regularize investigator training, and update all enforcement program procedure manuals. MBC should reinstate regular, sequential investigator training programs, many of which have been delayed or curtailed due to recent budgetary constraints. Coordinated training with sister agencies and organizations, including the Attorney General's Office and the California District Attorneys Association, should be considered as a means of maximizing training resources and effectiveness. All MBC policy or procedure manuals used in district offices, including the *Enforcement Operations Manual*, and training materials for medical consultants and expert reviewers, should be regularly updated and reviewed by appropriate MBC and HQE management staff (see related Recommendation #21 above).

Recommendation #28: MBC should expand and improve the medical consultant program. The Monitor recommends a series of steps to expand upon and improve the existing medical consultant program. Medical consultant hours should be increased, at least to restore the 15% reduction suffered in the fiscal year 2003–04 budget, and preferably to add a similar incremental increase. Greater availability of medical consultant assistance will pay immediate dividends in expediting the processing of quality of care cases in the district offices, where unavailability of these consultants is a frequent source of delay. In particular, more medical consultant time will permit substantially increased consultant review of expert reviewer opinions and contributions to the decision to transmit a case — consultant functions that are key to the speed and success of the entire investigative process, and which are reportedly underperformed or not performed in some offices today.

In addition, medical consultants should receive in-person training to help them better understand their functions in both CCU and the district offices, and to help standardize and rationalize the use of medical consultants in investigations. In turn, experienced MBC medical consultants should be directly involved in a restored training program for expert reviewers (see Recommendation #32 below). Medical consultants should be more directly involved in the recruitment of new expert reviewer candidates, as the medical consultants (who are physicians with recent practice experience in their communities) are often best positioned to assist in this effort.

Recommendation #29: MBC should improve investigator access to law enforcement information systems. Existing investigator access to databases available for peace officers, including the CLETS system and DMV records, should be made more readily and conveniently available to district office staff, including as necessary the installation of additional access terminals or computer links. MBC investigators should be funded and permitted to make use of commercial

investigative databases, such as Merlin, Westlaw/Dialog, and their equivalents, which are widely used in other law enforcement agencies. And to further improve cooperation with local prosecutors, MBC should seek appropriately limited access to the CDAA Consumer Protection Information Network and the Attorney General/CDAA Consumer Fraud Index.